Supreme Court, U.S.
FILED
OCT 10 200
ERK

(3)

No. 01-339

IN THE SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

ROBERT DOUGLAS SMITH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REASONS WHY THE WRIT SHOULD ISSUE

The Ninth Circuit has set aside a procedural bar to federal collateral review by erroneously concluding that Arizona trial and appellate court judges are required to address the merits of a claim before determining whether it is precluded under Arizona law. The Ninth Circuit's ruling that Smith's ineffective assistance of counsel claim (raised in state court for the first time in Smith's third post-conviction relief proceeding) is not procedurally barred flies in the face of principles of federalism and comity, and is not supported by case law or by logic. Moreover, the ruling applies *Ake v. Oklahoma*, 470 U.S. 68 (1985), in a way that conflicts with the approach followed in four other circuits.

The Ninth Circuit has in effect ruled that Rule 32 of Arizona's Rules of Criminal Procedure, precluding consideration of a claim "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding," is a nullity. The decision affects every Arizona criminal case (capital and non-capital) in which claims have been found to be precluded in a post-conviction proceeding. At a minimum, this Court should accept review to order that a question be certified to the Arizona Supreme Court to address any perceived lack of clarity in Arizona law regarding Arizona's rules of preclusion.

I

THE NINTH CIRCUIT'S RELIANCE ON THE "INDEPENDENT STATE GROUND" HOLDING IN *AKE V. OKLAHOMA* CREATES A CONFLICT WITH THE FOURTH, SIXTH, SEVENTH, AND TENTH CIRCUIT COURTS OF APPEAL.

Relying on language from this Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), *Harris v. Reed*, 489 U.S. 255 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991), Smith posits that "[i]t must be concluded, therefore, that *Ake*, a direct review case concerning the independent state ground doctrine, is fully applicable and relevant to habeas cases, and that the Ninth Circuit therefore correctly relied upon and applied *Ake* to this case." However, in *Coleman*, this Court

expressly left unanswered the question whether *Ake* applies in federal habeas, suggesting that the answer is not so obvious. Furthermore, even assuming *Ake* applies on federal collateral review, the Ninth Circuit's application of *Ake* in this case conflicts with the approach followed by other circuit courts of appeal.

A. *The Ninth Circuit's ruling is a departure from this Court's directives regarding the deference to be accorded to state procedural default rulings on collateral review.*

Smith's suggestion that the instant case is a logical extension of *Wainwright*, *Harris*, and *Coleman* should be summarily rejected. In *Wainwright*, this Court ruled that the petitioner had procedurally defaulted his involuntary confession claim by failing to comply with Florida state law requiring that the confession be challenged at trial or not at all. This Court noted:

> [The petitioner's] approach is, to say the least, difficult to square with the language of the [Florida Rule Crim. Proc. 3.190(i)], which in unmistakable terms and with specified exceptions requires that the motion to suppress be raised before trial. Since all of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial, and since their action in so doing is quite consistent with a line of Florida authorities interpreting the rule in question as requiring a contemporaneous objection, we accept the State's position on this point.

433 U.S. at 85–86.

In the instant case, the language of Rule 32.2 of the Arizona Rules of Criminal Procedure sets forth in unmistakable terms and with specified exceptions that a defendant is precluded from raising in a post-conviction proceeding any claim that has been waived at trial, on appeal, or in any previous collateral proceeding. In rejecting Smith's ineffective assistance claim, the state court relied on this procedural bar without mentioning the *Strickland* test or otherwise addressing the

merits of the ineffective assistance of counsel claim. As in *Wainwright*, this Court should find that the state procedural rule operates to bar federal review of the claim.

In *Harris*, this Court held that federal collateral review of a claim is not barred unless the underlying state court decision reflects a "plain statement" that the state court has relied on a procedural bar in rejecting the claim. 489 U.S. at 265. Here, that requirement was satisfied by virtue of the state court's rejection of Smith's claims raised in his third post-conviction relief proceeding because "they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b)." (Appendix C to Petition for Writ of Certiorari, at 2.)

Coleman is particularly unhelpful to Smith's position. This Court rejected Coleman's argument that the state court's dismissal order in his state court case was ambiguous because it was issued "[u]pon consideration" of all the filed papers, including briefing addressing the merits of Coleman's federal claims. 501 U.S. at 744. This Court expressly recognized "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Id.* at 750.

It is difficult to imagine a case more inconsistent with *Coleman* than the instant case, in which the Ninth Circuit, addressing an issue the court raised on its own, concluded that Arizona's procedural rules regarding preclusion in post-conviction proceedings do not mean what they say. Smith's own counsel did not proffer this argument in the district court or in the Ninth Circuit. Nor did counsel for the petitioner in *Stewart v. LaGrand*, 526 U.S. 115 (1999), which involved the same procedural rule as that at issue in the instant case. Nor did this Court in *LaGrand*. To suggest that the Ninth Circuit's ruling is a reasonable extension of *Coleman* is an "Olympic stretch." *See Sochor v. Florida*, 504 U.S. 527, 534 n.* (1992).

Finally, Smith's quotation of the following language from *Coleman* provides additional insight as to why the Ninth Circuit's approach in this case is improper: "Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review." *Coleman*, 501 U.S. at 736 (citing *Harris*, 489 U.S. at 264). Response at 8. As pointed out in the amicus brief filed by the Criminal Justice Legal Foundation, this Court refused to overlook a procedural bar on direct review in *Sochor*, notwithstanding Florida law requiring the state appellate court to review for "fundamental error" a claim that had been waived at trial but raised on direct appeal. This Court noted that, because Florida's review for fundamental error did not equate to a review for all types of federal constitutional error, this Court lacked jurisdiction to address the merits of the claim. 504 U.S. at 534 n. *.

In the present case, the review engaged in by the state courts before determining whether a claim is precluded is simply a categorization inquiry, to determine whether the claim involves an issue for which an on-the-record waiver by the defendant is required. But even assuming the review is more than a categorization inquiry, it is clear that it involves something less than the full review for all constitutional error at issue in *Ake*. If the Ninth Circuit's ruling is not reversed by this Court, Smith and other Arizona prisoners will be granted, on federal collateral review, relief to which they would not have been entitled on direct review under *Sochor*.

B. *The Ninth Circuit stands alone in its application of Ake to a case in which the state courts did not analyze the merits of the claim at issue.*

Smith disputes that the decision in the instant case conflicts with cases from other circuits, and he cites a number of cases (Response at 14–15) in which *Ake* has been applied in federal habeas. However, *none* of the cases cited involve a holding (by a circuit court other than the Ninth Circuit) in which the court applied *Ake* to overlook a state procedural bar where the state court engaged in something less than a complete on-the-merits review for federal constitutional error.

As noted above, the instant case does not involve a comprehensive merits review for all types of federal constitutional error. The Ninth Circuit's ruling in this case conflicts with every circuit court that has analyzed whether *Ake* applies to a type of review less comprehensive than that at issue in *Ake*.

II

ASSUMING *AKE* APPLIES IN FEDERAL HABEAS, THE NINTH CIRCUIT'S RULING UNREASONABLY EXTENDS *AKE* BY MISINTERPRETING ARIZONA LAW.

A. *The State Courts Clearly Relied On A Procedural Bar.*

In discussing the "clearly relied" prong, Smith argues that "if a state procedural rule is not independent of federal law, then a court's ruling based on that rule can never be independent of federal law assuming that the state court follows the rule, which it must." (Response at 25.) Smith's argument conflates the "clearly relied" requirement with the "independent state ground" requirement. That argument ignores the fact that the Ninth Circuit used the "clearly relied" requirement as a *separate* basis for overlooking the procedural bar apart from the "independent state ground" requirement.

As amicus counsel has pointed out, "[n]o rational person could compare the order in the present case with the one in *Coleman* and find this one to be the less clear of the two. To the extent they differ, the differences point the other way." Amicus Brief at 12. The Ninth Circuit's failure to mention, let alone distinguish, *Coleman* in discussing the clear reliance issue is inexcusable. The state courts clearly relied on a procedural bar in rejecting Smith's ineffective assistance of counsel claim in his third post-conviction proceeding.

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B. *The Ninth Circuit Misinterpreted 1992 Changes to Rule 32, And Erred By Concluding That Arizona Courts Are Now Required To Review The Merits Of A Claim Before Finding It To Be Precluded.*

Smith argues that *State v. Espinosa*, 29 P.2d 278 (Ariz. App. 2001), in which the Arizona Court of Appeals interpreted the state courts' review of a precluded claim to be a categorization inquiry, should be ignored. To the contrary, *Espinosa* is directly on point, and should be given more weight than the dicta relied on by the Ninth Circuit from *State v. French*, 7 P.3d 128 (Ariz. App. 2000), and *State v. Curtis*, 912 P.2d 1341 (Ariz. App. 1995).

Smith does not dispute the history of Rule 32.2 provided by the State. Nor does he dispute that every previous federal court decision (including a decision from this Court) interpreting the 1992 amendment to Rule 32.2 has found that preclusion under Rule 32.2 results in a bar to federal collateral review. The Ninth Circuit's *sua sponte* decision to re-interpret the 1992 amendment to Rule 32.2 to do away with the procedural bar is unsupportable.

C. *The Ninth Circuit Erred By Refusing To Certify A Question To The Arizona Supreme Court To Clarify The Meaning Of Arizona Law.*

Smith's acknowledgment that *Espinosa* conflicts with the Ninth Circuit's ruling in this case suggests that, at a minimum, this Court should certify a question to the Arizona Supreme Court to clarify the alleged uncertainty in Arizona law regarding Arizona's rules of preclusion. Furthermore, one of the cases cited by Smith (Response at p. 13) provides additional support for that position. In *Spivey v. Head*, 207 F.3d 1263, 1283, n.20 (11th Cir. 2000), the Eleventh Circuit sidestepped the issue of whether Georgia procedural default law required the consideration of an antecedent question of federal constitutional law. The court noted that "Rather than attempt to resolve this *state law* issue, we assume *arguendo* that there is no procedural bar," and rejected the claim on the merits. 207 F.3d at 1283, fn. 20 (emphasis added).

The Eleventh Circuit's conclusion that the question is one of *state law* mirrors the deference accorded by this Court to the Virginia Supreme Court in *Coleman* when it "declii.e[d] Coleman's invitation to announce such a practice [relating to a Virginia procedural rule] for that court." 501 U.S. at 743–44.

Smith argues that because "it was clear to the Ninth Circuit from the Rule and the Comment that the "constitutional magnitude" of a claim must be determined in order to apply Rule 32.2(a)(3)," "[t]here is therefore no need for a certified question." Smith's argument is belied by the fact that his own attorneys apparently did not recognize the clarity of the rule, and by the fact that no other court (including this Court) interpreting the amended version of Rule 32.2 has recognized the theory advanced by the Ninth Circuit. At best, the Ninth Circuit's new theory relating to how Rule 32.2 should be interpreted establishes the need for a question to be certified to the Arizona Supreme Court regarding the meaning of Rule 32.2

III

WHETHER ARIZONA IS AN "OPT-IN" STATE IS IRRELEVANT IN THIS CASE.

Relying on Ninth Circuit's recent ruling in *Spears v. Stewart*, 2001 WL 111968 (9th Cir. 2001), that Arizona has now "opted in" to the accelerated federal review provisions set forth in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Smith argues that the State is somehow foreclosed from raising any "contradictory" arguments relating to pre-AEDPA procedural default rules.

Smith's argument is nonsensical. This is not an opt-in case. The attorney appointed to represent Smith in his first (pre-1996) post-conviction proceeding was obviously not appointed under the "opt-in" provisions adopted by the State after 1996. The State has never argued, and never will argue, that this is an "opt-in" case. Nor will it ever argue that any other case in which post-conviction counsel was not appointed under the "opt-in" provisions is an "opt-in" case. There is nothing

contradictory about the arguments the State is advancing in this case and those advanced in the *Spears* litigation.

CONCLUSION

The Ninth Circuit's ruling that the procedural bar imposed by the state courts in rejecting Smith's ineffective assistance of counsel claim in his third state post-conviction proceeding conflicts with case law from this Court and from four federal circuits, and is premised on a misinterpretation of Arizona law. The ruling affects, not only this case, but *every* pending and future Arizona criminal case (capital and non-capital) in which claims have been found (or will be found) precluded in a post-conviction proceeding under Rule 32.2.

None of the case law or argument provided by Smith provides a basis for upholding the Ninth Circuit's ruling. Accordingly, and based on the foregoing authorities and argument, the State of Arizona requests that this Court grant the petition for writ of certiorari.

Respectfully submitted.

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